



Federal Communications Commission
Washington, D.C. 20554

August 31, 2007

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Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Federal Communications Commission
Office of the Secretary

RE: *In re News Corporation and DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee for Authority to Transfer Control,*
MB Docket No. 07-18

Dear Ms. Dortch:

Attached for filing in the above-referenced proceeding are copies of the Memorandum Opinion and Order: *In Re General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Mem. Op. and Order, 19 FCC Rcd 473 (Rel. Jan. 14, 2004) ("*News Hughes Order*"). Three marked versions of the *News Hughes Order* are attached for filing in the above-referenced proceeding: (1) two copies of a redacted version that may be inspected by the public and that is accordingly marked for public inspection; and (2) an unredacted, highly confidential version that is not for public inspection and is so marked. The highly confidential version of the *News Hughes Order* shall be subject to the Second Protective Order in this proceeding¹ because it includes highly confidential information that News Corporation and Hughes Electronics submitted pursuant to protective order in *News-Hughes*.² This highly confidential information has been redacted in the public-inspection version. The highly confidential version redacts highly confidential information provided by Gemstar TV Guide International, which is not a party to this proceeding.

Parties to this proceeding that wish to review the highly confidential version of the *News Hughes Order* may inspect the document, subject to the terms and conditions of the Second Protective Order in this proceeding,³ by contacting the law offices of Harris, Wiltshire & Grannis at 202-730-1300.

Feel free to contact me if you have any questions about this matter.

Sincerely,

Monica Shah Desai
Chief, Media Bureau

¹ *In re News Corporation and DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee for Authority to Transfer Control*, Protective Order, MB Dkt No. 07-18, DA 07-3106 (rel. July 10, 2007) ("*Second Protective Order*").

² *In re General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Order, MB Dkt 03-124, DA 03-2376 (rel. July 22, 2003).

³ See *Second Protective Order*, *supra* note 1.

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Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| General Motors Corporation and |) | |
| Hughes Electronics Corporation, Transferors |) | MB Docket No. 03-124 |
| |) | |
| And |) | |
| |) | |
| The News Corporation Limited, Transferee, |) | |
| |) | |
| For Authority to Transfer Control |) | |

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 2003

Released: January 14, 2004

By the Commission: Chairman Powell, Commissioners Abernathy and Martin issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

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I. INTRODUCTION

1. In this Order, we consider the application (“Application”)¹ of General Motors Corporation (“GM”), Hughes Electronics Corporation (“Hughes”), and the News Corporation Limited (“News Corp.”) (collectively, the “Applicants”) for consent to transfer control of various Commission licenses and authorizations, including direct broadcast satellite (“DBS”)² and fixed satellite space station, earth station, and terrestrial wireless authorizations held by Hughes and its wholly- or majority-owned subsidiaries to News Corp. The proposed transaction involves the split-off of Hughes from GM, wherein Hughes will become a separate and independent company, followed by a series of transactions through which News Corp., through its majority-held subsidiary, Fox Entertainment Group (“FEG”), will acquire a 34% interest in Hughes. The remaining 66% interest in Hughes will be held by three GM employee benefit trusts (managed by an independent trustee), which combined will hold an approximately 20% interest in Hughes, and by the general public, which will hold an approximately 46% interest in Hughes.

2. If approved, the proposed transaction will result in News Corp. holding the single largest block of shares in Hughes, thus providing News Corp. with a *de facto* controlling interest over Hughes and its subsidiaries, including DirecTV Holdings, LLC (“DirecTV”), a wholly-owned subsidiary of Hughes, which provides DBS service in the United States, as well as Hughes Network Systems, Inc. (“HNS”), a facilities-based provider of very small aperture terminal (“VSAT”) network systems, and PanAmSat Corporation (“PanAmSat”), a global facilities-based provider of geostationary-satellite orbit fixed satellite services (“FSS”). As described in the Application, if the proposed transaction is consummated, K. Rupert Murdoch, chairman and chief executive officer (“CEO”) of News Corp., will become chairman of Hughes, and Chase Carey, News Corp.’s former co-chief operating officer, will become president and chief executive officer of Hughes. Hughes’ board of directors will consist of 11 directors, six of whom will be independent directors.

3. Among News Corp.’s video programming assets are 35 owned and operated (“O&O”) full-power television broadcast stations, a television broadcast network, ten national cable programming networks, and 22 regional cable programming networks. With 11.4 million subscribers – 13% of all multichannel video programming distribution (“MVPD”) households – DirecTV is second only to Comcast Corporation in its share of the MVPD market. With its national footprint, DirecTV competes with every single MVPD in the country, in markets of all sizes.

4. Currently, News Corp. supplies programming to DirecTV and other MVPDs, and DirecTV is a buyer of programming content from News Corp. and other programming suppliers. By combining News Corp.’s programming assets with DirecTV’s national distribution platform, the proposed

¹ See *Consolidated Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and the News Corporation Limited, Transferee, for Authority to Transfer Control*, May 2, 2003 (“May 2003 Filing”). The term, “Application,” refers to the May 2003 Filing and the letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (May 30, 2003) (clarification of Application). The Media Bureau placed the Application on public notice on May 16, 2003, DA 03-1725, MB Docket No. 03-124, establishing a comment cycle for this proceeding. See Appendix A for a list of parties filing in this proceeding and the abbreviations by which they are identified herein.

² DBS is the acronym used in the United States to describe the domestic implementation of the satellite service known internationally as the broadcasting satellite service (“BSS”). See 47 C.F.R. § 25.201.

transaction creates a vertically integrated content/distribution platform. It thereby changes the nature of News Corp.'s relationship with all other MVPDs from that of solely a programming supplier to that of both a supplier of crucial inputs and a direct competitor in the end user MVPD market. As discussed more fully below, our analysis of the principal allegations of competitive harm in the record demonstrates that this vertical integration has the potential to increase the incentive and ability of News Corp. to engage in temporary foreclosure bargaining strategies during carriage negotiations with competing MVPDs for two types of "must have" video programming products – broadcast television station signals and regional cable programming sports networks -- in order to secure higher prices for its programming.³ Although News Corp., like other broadcast networks, engages or attempts to engage in this sort of behavior today, ownership of a competing MVPD platform with a national footprint means that News Corp. stands to gain from any subscriber losses the affected MVPD suffers during the period of foreclosure when those subscribers move over to its competing MVPD platform to access the desired programming.⁴ The ability to gain revenues via its ownership interest in DirecTV thereby helps offset any temporary losses that News Corp. would suffer from withdrawal of its programming from the competing MPVD in terms of lost advertising and/or affiliate fee revenues. This off-setting revenue gain makes use of the strategy more tolerable to News Corp post-transaction than it was pre-transaction and thereby increases the likelihood and frequency of its use. This lowering of the costs of foreclosure to News Corp. from present levels fundamentally and substantially alters the bargaining dynamic between the program supplier and the competing programming distributor to the benefit of the former at the expense of the latter and its subscribers. To the extent that News Corp. succeeds in using temporary foreclosure strategies to extract supra-competitive prices for its programming, these transaction-specific higher programming costs are likely to be passed through as higher MVPD prices, which in turn would harm consumers.

5. Applicants have alleged, and we have found, various public interest benefits from the transaction, including more potent competition to cable, increased innovation and consumer benefits in terms of programming and services, and increased penetration of local-into-local broadcasting service. Our license conditions described below are designed to lessen the impact of the public interest harms outlined above, while preserving the benefits of the transaction for the public. Based on the record before us, we find that on balance and as conditioned, the subject license transfer approvals will serve the public interest. We therefore grant the Application with the conditions specified below.

³ In this Order, "[REDACTED]" indicates confidential or proprietary information, or analysis based on such information, submitted pursuant to the First and/or Second Protective Orders. *See News Corporation, General Motors Corporation, and Hughes Electronics Corporation, Order Adopting Protective Order*, DA 03-1761 (rel. May 22, 2003); *News Corporation, General Motors Corporation, and Hughes Electronics Corporation, Order Concerning Second Protective Order*, DA 03-2376 (rel. July 22, 2003). The unredacted version of this Order is available upon request only to those parties who have executed and filed with the Commission signed acknowledgements of the Second Protective Order. Qualified representatives who have not yet signed the required acknowledgement may do so in order to obtain the unredacted Order.

⁴ *See, e.g., Most Cable MSOs Get Deals Done on Retransmission Consent*, WARREN'S CABLE REGULATION MONITOR, Jan. 13, 2003; Joanne Ostrow, *Denver ABC Affiliate Engages in Big Dispute with AT&T Broadband*, THE DENVER POST, Dec. 31, 2002; Bruce Orwall and Joe Flint, *Disney, Time Warner Sign Deal, Settling Their Nasty, Public Feud*, WALL ST. J., May 26, 2000.

II. DESCRIPTION OF THE PARTIES

A. The News Corporation Limited

6. News Corp. is a corporation formed under the laws of South Australia with securities that are publicly traded on both the New York Stock Exchange and the Australian Stock Exchange.⁵ News Corp. is a diversified international media and entertainment company with operations in a number of industry segments, including: filmed entertainment, television, cable network programming, magazines and inserts, news papers, and book publishing.⁶ Shareholders holding a greater than 10% interest in News Corp. are K. Rupert Murdoch, a U.S. citizen and chief executive of News Corp., who directly and indirectly controls an approximately 16% equity and 30% voting interest in News Corp.,⁷ and Liberty Media Corporation (“Liberty”), a Delaware corporation, which holds preferred limited voting ordinary shares representing approximately 17.6% of the shares of News Corp. but with no voting rights except in limited instances.⁸ Liberty holds interests in domestic and international video programming, interactive technology services, and communications businesses in the United States, Europe, Latin America, and Asia.⁹ Among its holdings are majority ownership interests in Starz Encore Group LLC (100%) and

⁵ See Application, Volume I, C for a chart summarizing the relevant News Corp. ownership structure prior to the proposed transaction; see also News Corporation Limited, SEC Form 20-F, Annual Report for the fiscal year ended June 30, 2003 at 5, 72 (“*News Corp. 20-F 2003 Annual Report*”).

⁶ See *News Corp. 20-F 2003 Annual Report* at 5.

⁷ This approximate percentage is calculated based on 2,097,473,050 ordinary shares outstanding on Sep. 30, 2003, and includes ordinary shares owned by: (1) K. Rupert Murdoch; (2) Cruden Investments, Limited, a private Australian investment company owned by K. Rupert Murdoch, members of his family and various corporations and trusts, the beneficiaries of which include K. Rupert Murdoch, members of his family and certain charities; and (3) corporations which are controlled by trustees of settlements and trusts established for the benefit of the Murdoch family, certain charities, and other persons. In addition, K. Rupert Murdoch, Cruden Investments, Limited and such other entities beneficially own 217,126,040 preferred limited voting ordinary shares. See *News Corp. 20-F 2003 Annual Report* at 5, 70.

⁸ A holder of News Corp. preferred limited voting ordinary shares is entitled to vote on: a proposal to reduce the share of capital of the company; on a proposal to wind up or during the winding-up of a company; a proposal for the disposal of the whole of the property, business, and undertaking of the company; a proposal that affects rights attached to such preferred shares; a resolution to approve the terms of a buy-back agreement; and during a period in which a dividend (or part of a dividend) in respect of the preferred shares is in arrears. See *News Corp. 20-F 2003 Annual Report* at p. F-39; see also Liberty Media Corporation, SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 at p. I-6 (“*Liberty 10-K 2002 Annual Report*”). On October 6, 2003, the News Corp. notified the Commission that Liberty had exercised its right to purchase \$500 million in News Corp. preferred limited voting ordinary American Depositary Receipts (“ADRs”), increasing Liberty’s passive interest in News Corp. from approximately 17.6% to approximately 19% of the company’s issued and outstanding stock. If News Corp. were to exercise its right to offer ADRs as consideration in connection with its acquisition of an interest in Hughes to the maximum extent permissible under the documents governing the proposed transaction, Liberty’s ownership interest in News Corp. would be diluted to approximately 17.3%, based on current stock prices. See Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (Oct. 6, 2003).

⁹ See *Liberty 10-K 2002 Annual Report* at p. I-1. On May 12, 2003, EchoStar Satellite Corporation (“EchoStar”) filed a Petition to Require Additional Information requesting that the Commission require the Applicants to submit information concerning the planned involvement of Liberty in the financing of the proposed purchase by News (continued....)

Liberty Satellite and Technology, Inc. (87%), and minority interests in a number of other companies.¹⁰ *Liberty also holds a controlling interest in Astrolink International LLC, and the largest plurality interest in Wildblue Communications, Inc., both Commission licensees authorized to construct, launch and operate satellites using frequencies in the Ka-band.*¹¹

7. News Corp. holds its U.S. programming interests through its Fox Entertainment Group, Inc. subsidiary, a Delaware corporation, in which News Corp. currently holds an approximately 80.6% ownership and 97% voting interest.¹² The remaining 19.4% equity is publicly traded on the New York Stock Exchange.¹³ The Fox Entertainment Group, Inc. is principally engaged in the development, production and distribution of television broadcasting and cable network programming.¹⁴ Its programming interests include Fox Broadcasting Company, Fox Television Stations, Twentieth Century Fox Film, Twentieth Century Fox Television, Fox News Channel, and Fox Cable Networks.¹⁵ News Corp. indirectly holds interests in a number of direct-to-home (“DTH”) subscription services, all of which operate outside the United States, including a 35% indirect interest in British Sky Broadcasting (“BSkyB”), which operates in the United Kingdom and Ireland.¹⁶ In addition, News Corp. holds an approximately 42.9% interest in Gemstar-TV Guide International, Inc. (“Gemstar”), which, among other things, produces an electronic program guide for on-screen navigation of program offerings.¹⁷ News Corp. also holds an approximately 79% equity interest in NDS Group plc (“NDS”), a supplier of conditional access systems that provide secure solutions for pay television systems.¹⁸

(Continued from previous page)

Corp. in Hughes. *See* EchoStar Petition to Require Additional Information, May 12, 2003 at 2-5. EchoStar also requested the Commission to require Applicants to provide expert testimony in support of their key economic assertions, including information about assertions concerning the relevant product and geographic markets and the Applicants’ market power in these markets. *Id.* at 5-6. On May 13, 2003, the Applicants filed a Decl. of Lawrence A. Jacobs, Executive Vice President and Deputy Counsel to News Corp., to expand and reiterate on Liberty’s interest in News Corp. and the proposed transaction. *See* Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (May 13, 2003), forwarding the Decl. of Lawrence A. Jacobs (“*News Corp. Decl.*”). Both the EchoStar Petition to Require Additional Information and the *News Corp. Decl.* were made part of the record of this proceeding.

¹⁰ Companies in which Liberty holds a minority interest include Discovery Communications (50%), OpenTV Corp. (46%), QVC (42%), Sprint PCS Group (19%), and USA Interactive (20%). Liberty also holds less than a one percent interest in the GMH tracking stock issued by GM. *See Liberty 10-K 2002 Annual Report* at I-5, I-21.

¹¹ *Id.* at I-21.

¹² *See News Corp. 20-F 2003 Annual Report* at 6; *see also* Fox Entertainment Group, Inc., SEC Form 10-K, Annual Report for the fiscal year ended June 30, 2003 at 1 (“*FEG 10-K 2003 Annual Report*”).

¹³ *See FEG 10-K 2003 Annual Report* at 20.

¹⁴ *Id.* at 1-10.

¹⁵ *See* Application, Volume I, F for a list of News Corp.’s national and regional cable programming interests in the United States.

¹⁶ *See News Corp. 20-F 2003 Annual Report* at 18.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 19; Application at 10.

B. General Motors Corporation and Hughes Electronics Corporation

8. Hughes, a Delaware corporation, is a wholly owned subsidiary of GM, also a Delaware corporation.¹⁹ Hughes holds a number of Commission licenses and authorizations directly or through its wholly- or majority-owned subsidiaries.²⁰ Hughes' wholly-owned subsidiaries include both DirecTV, the parent company of DirecTV Enterprises, LLC, and United States Satellite Broadcasting Company, Inc., both Commission DBS licensees.²¹ DirecTV currently provides service to U.S. consumers from seven DBS satellites using 32 channels at 101° W.L. orbital location, three channels at 110° W.L. orbital location, and 11 channels at 119° W.L. orbital location.²² In the United States, DirecTV, together with certain independent distributors, have approximately 11.9 million DBS subscribers.²³ HNS also is a wholly-owned subsidiary of Hughes and holds a number of authorizations for transmit/receive earth stations and VSAT networks for use of frequencies in the C- and Ku-bands, as well as authorizations for the construction, launch and operation of the Ka-band SPACEWAY Satellite System.²⁴ Hughes also indirectly holds an approximately 81% economic and voting interest in PanAmSat, a publicly traded Delaware corporation and the corporate parent of PanAmSat Licensee Corp., a Commission licensee that holds authorizations to operate fixed satellite service systems using the C- and Ku-bands, as well as authorizations for numerous earth stations which are licensed to transmit and receive frequencies in the C- and Ku-bands.²⁵

¹⁹ GM has issued a publicly traded tracking common stock (GM Class H common stock) designed to provide shareholders with financial returns based on the economic performance of the business and assets of GM's wholly-owned Hughes subsidiary. See General Motors Corp., SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 ("*GM 10-K 2002 Annual Report*"); see also Hughes Electronic Corp., SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 ("*Hughes 10-K 2002 Annual Report*").

²⁰ A complete list of licenses and authorizations held by Hughes and subject to this transfer of control Application is set forth in the Application, Volume I, A.

²¹ See *Hughes 10-K 2002 Annual Report* at 3, 85.

²² See *Tempo Satellite Inc. and Hello Enterprises, Inc.*, 14 FCC Rcd 7946 (IB 1999) ("*Tempo-Hello Order*"); see also *Hello Enterprises, Inc.*, 7 FCC Rcd 2728 (IB 1992) and 7 FCC Rcd 6597 (IB 1992).

²³ Of these, approximately 10.3 million subscribe directly to DirecTV, while the remainder subscribe through the National Rural Telecommunications Cooperative ("NRTC"). See Hughes Electronic Corp., SEC Form 10-Q, Quarterly Report for the period ending Sep. 30, 2003 at 32, 37 ("*Hughes 10-Q September 2003 Report*"). Hughes also has an interest in direct-to-home ("DTH") and other satellite services in several foreign countries. See *Hughes 10-K 2002 Annual Report* at 3-4. Licenses for the services provided in foreign countries, however, are not part of the proposed transaction. See Application at 6, n.12.

²⁴ See *Hughes 10-K 2002 Annual Report* at 4.

²⁵ See PanAmSat Corp., SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 at 2 ("*PanAmSat 10-K 2002 Annual Report*"); see also *Hughes 10-K 2002 Annual Report* at 4. See *Hughes Communications, Inc.*, 12 FCC Rcd 7534 (1997). With the exception of six satellite earth station licenses held by PanAmSat, none of the licenses controlled by Hughes is a common carrier or broadcast radio license. See Application at 5, n.7. The Commission granted PanAmSat's applications to remove the common carrier designation from its earth station licenses earlier this year. See FCC Public Notice, Report No. SES-00506 (rel. Jun. 11, 2003) (notice of grant of applications SES-MOD-20030425-00533; SES-MOD-20030425-00534; SES-MOD-20030425-00537); FCC Public Notice, Report No. SES-00510 (rel. Jun. 25, 2003) (notice of grant of applications SES-MOD-20030425- (continued....))

C. The Proposed Transaction

9. The transaction will be accomplished in two parts. GM will split off Hughes and divest its interest in Hughes such that Hughes will become a separate and independent company. As a result of these and several related transactions, News Corp. will own a 34% interest in Hughes, and will become the largest single holder of Hughes stock. Three GM employee benefit trusts managed by an independent trustee will own a combined approximately 20% interest in Hughes, and the remaining 46% interest in Hughes will be held by the general public.²⁶

10. *The Split-Off of Hughes.*²⁷ Hughes is currently part of GM. GM has issued a tracking stock, GM Class H common stock (“GMH shares”) to investors who wish to “invest” in Hughes. The GMH shares are held by the public and are traded on the New York Stock Exchange (“NYSE”). The total number of GMH shares issued and outstanding as of the date of the Application represented an approximate 80.1% indirect economic interest in the financial performance of Hughes, the largest block of which is held by three GM employee benefit trusts.²⁸ GM itself owns all of the common stock of Hughes, holds all of Hughes’ voting power, and retains the remaining approximately 19.9% economic interest in Hughes.²⁹ As one of the first steps of the proposed transaction after the payment by Hughes to GM of a \$275 million dividend, GM will distribute to the holders of GMH shares new shares of Hughes common stock in exchange for the outstanding GMH shares – on a share-for-share basis.³⁰ GM’s 19.9% interest in Hughes will be represented by Hughes Class B common stock.³¹

11. *The Stock Purchase.*³² Simultaneous with the Hughes split-off, News Corp. will purchase GM’s approximately 19.9% interest in Hughes for \$14 per share³³ payable in cash, or, at News Corp. election, up to 20% of the total amount may be paid to GM in News Corp. preferred limited voting ordinary American Depository Receipts (“ADRs”).³⁴

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00535 and SES-MOD-20030425-00536; FCC Public Notice, Report No. SES-00514 (rel. Jul. 9, 2003) (notice of grant of SES-MOD-20030425-00532). PanAmSat also has notified the Commission of discontinuance of service under its inactive section 214 authorizations. See Application at 5, n.7; FCC Public Notice, 18 FCC Rcd 10552 (2003) (public notice of PanAmSat’s intent to surrender authorizations ITC-214-19980102-00004, ITC-93-236, ITC-95-579, ITC-85-221 and ITC-85-069).

²⁶ For details of the proposed transaction, see Application, Volume II, which includes the Separation Agreement, Merger Agreement, and Stock Purchase Agreement; see also Application at 10.

²⁷ See Application, Volume II, Separation Agreement.

²⁸ See Application at 11.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Application, Volume II, Stock Purchase Agreement.

³³ This will amount to approximately \$3.8 billion, subject to adjustments as described in the Application.

³⁴ See Application at 11.

12. *The Merger.*³⁵ News Corp. will form a new subsidiary specially created to merge with Hughes (“merger subsidiary”). Immediately following the split-off and stock purchase described above, the merger subsidiary will merge with and into Hughes, with Hughes being the surviving corporation.³⁶ In connection with the merger, News Corp. will acquire from the former GMH shareholders an additional 14.1% of Hughes for \$14 per share payable at News Corp.’s election in the form of News Corp. preferred ADRs, cash, or a combination of preferred ADRs and cash.³⁷ As a result of the merger, each former GMH shareholder will receive for each of their Hughes shares owned, consideration of which approximately 82.4% will consist of equity in Hughes and 17.6% will consist of News Corp. preferred ADRs and/or cash.³⁸ Automatically upon consummation of the merger, the Hughes Class B common stock acquired by News Corp. from GM will be converted on a share-for-share basis into Hughes common stock with no class. The consequence of these transactions is that after the merger, News Corp. will hold 34% of Hughes common stock and the former GMH shareholders will hold 66% of Hughes common stock.³⁹ Immediately following the merger, the shares of Hughes acquired by News Corp. will be transferred to FEG or a wholly-owned subsidiary of FEG for a combination of a promissory note and stock in FEG. The acquisition of this stock will increase News Corp.’s ownership interest in FEG, currently 80.6%, to approximately 82%.⁴⁰

13. *The Resulting Ownership and Management Structure.*⁴¹ As a result of the proposed transactions, Hughes will become an independent company incorporated in the United States with a single class of publicly traded common stock. News Corp., through its FEG subsidiary, will control the single largest block of shares in Hughes with a 34% interest. The remaining 66% interest in Hughes will be held by the former owners of GMH shares. Of this public shareholding, trusts established under various GM employee benefit plans will hold, in the aggregate, an approximately 20% interest.⁴² The United States Trust Company of New York (“US Trust”) serves as the independent trustee of each of those trusts with respect to such shares, and is therefore expected to initially hold, in the aggregate, approximately 20% of the voting power of Hughes common stock. Subject to its fiduciary duties as trustee, US Trust will have sole discretion in exercising those voting rights. The remaining shares will be widely held by the public. Hughes will continue to own indirectly approximately 81% of the shares of PanAmSat. After the transaction, GM will no longer hold any shares of Hughes common stock.⁴³

³⁵ See Application, Volume II, Merger Agreement.

³⁶ See Application at 12.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Application, Volume I, D, Hughes Simplified Ownership Structure of FCC Licenses (Post-Transaction), Principal Ownership List, Officers and Board of Directors.

⁴² See Application at 12.

⁴³ *Id.* at 13.

14. The Applicants state that, after the closing of the transaction, Hughes' board of directors will consist of 11 members, of which six will be independent.⁴⁴ The parties have agreed upon an initial slate of directors, all of whom are U.S. citizens and include K. Rupert Murdoch as chairman of the board and Chase Carey as CEO.⁴⁵ The board will have an Audit Committee comprised entirely of independent directors. Among its other functions, the Audit Committee will review and approve all related-party transactions in such amounts and related to such matters as the Audit Committee determines. Accordingly, because News Corp. and its programming vendor subsidiaries would be considered related parties, any transaction they might enter into with Hughes or DirecTV may be subject to review and approval by the Audit Committee.⁴⁶ No single shareholder will have a *de jure* controlling interest in the company either through a majority interest in voting stock or majority representation on the board. Because News Corp. will indirectly control a 34% interest in Hughes and its former employee will be CEO, News Corp., for purposes of the Communications Act, will exercise *de facto* control over Hughes.

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

15. The Commission must determine whether the Applicants have demonstrated that the proposed transfer of control of licenses from GM to News Corp. will serve the public interest, convenience, and necessity.⁴⁷ The public interest standard involves a balancing of potential public interest harms of the proposed transaction and the potential public interest benefits.⁴⁸ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.⁴⁹

16. Our public interest evaluation under Section 310(d) necessarily encompasses the "broad aims of the Communications Act,"⁵⁰ which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and

⁴⁴ *Id.*

⁴⁵ There is no corporate governance mechanism that ensures that News Corp. will continue to have four representatives on the board, or that Mr. Murdoch and Mr. Carey will continue to hold the position of chairman and CEO, respectively. *See* Application at 13, n.23.

⁴⁶ *Id.* at 13.

⁴⁷ 47 U.S.C. § 310(d).

⁴⁸ *See, e.g., Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp. (Transferors) to AT&T Comcast Corp. (Transferee)*, 17 FCC Rcd 23246, 23255 (2002) ("Comcast-AT&T Order"); *see also EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferees)*, 17 FCC Rcd 20559, 20574 ("EchoStar-DirecTV HDO").

⁴⁹ *See, e.g., Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20574. If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, Section 309(e) of the Act requires that we designate the application for hearing. 47 U.S.C. § 309(e).

⁵⁰ *Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575.

accelerating private sector deployment of advanced services.⁵¹ To apply our public interest test, then, we *must determine whether the transaction violates our rules, or would otherwise frustrate implementation or enforcement of the Communications Act and federal communication policy.* That policy is shaped by Congress and deeply rooted in a preference for competitive processes and outcomes.⁵²

17. Our determination of the competitive effects of the proposed transaction under the public interest standard is not limited by traditional antitrust principles.⁵³ The Commission and the Department of Justice (“DOJ”) each have independent authority to examine communications transactions involving mergers and acquisitions, but the standards governing the Commission’s review differ from those of DOJ.⁵⁴ The review conducted by DOJ is pursuant to Section 7 of the Clayton Act, which prohibits transactions that are likely to substantially lessen competition in any line of commerce.⁵⁵ The Commission, on the other hand, is charged with determining whether the transaction serves the broader public interest.⁵⁶

⁵¹ See 47 U.S.C. §§ 157 nt, 254, 332(c)(7), Telecommunications Act of 1996, Preamble; *Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821; cf. 47 U.S.C. §§ 521(4), 532(a).

⁵² See, e.g., *MCI Telecommunications Corporation and EchoStar 110 Corporation*, Order and Authorization, 16 FCC Rcd 21608 (1999) (quoting *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160 at ¶ 14 (1999) (“AT&T-TCI Order”)).

⁵³ See *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575 (citing *Satellite Business Systems*, 62 F.C.C.2d 997, 1088 (1977) *aff’d sub nom United States v. FCC*, 652 F.2d 72 (DC Cir., 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies “to analyze proposed mergers under the same standards that the Department of Justice . . . must apply”)).

⁵⁴ See *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575; *AT&T-TCI Order*, 14 FCC Rcd at 3168-69.

⁵⁵ 15 U.S.C. § 18.

⁵⁶ For example, under our Section 310(d) public interest analysis, we consider whether the transaction is consistent with the Commission’s policies to advance diversity. It has long been a basic tenet of national communications policy that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972). Our public interest analysis may also consider whether the proposed transfer of control will affect the quality of communications services or will result in the provision of new or additional services to consumers (see *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821); whether the applicant has the requisite “citizenship, character, financial, technical, and other qualifications” to hold a Commission license (see, e.g., 47 U.S.C. §§ 310(d) and 308(b)); and we may, in appropriate cases, take foreign ownership into account to determine whether there are public interest harms resulting from foreign investment in Title III licensees. This consideration is in addition to our review of foreign ownership that may otherwise be required under Section 310(a) and (b) of the Act. See, e.g., *Orbital Communications Corporation and ORBCOMM Global, L.P. (Assignors) and ORBCOMM License Corp. and ORBCOMM LLC (Assignees)*, 17 FCC Rcd 4496, 4506-07 (IB 2002) (“*Orbcomm Order*”). Finally, where necessary, we may also consider whether the transaction raises issues of national security, law enforcement, foreign policy and trade policy, including any such concerns that may be raised by the Executive Branch. See *Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Service in the United States*, 12 FCC Rcd 24094, 24170 (1997) (“*DISCO II Order*”).

IV. COMPLIANCE WITH COMMUNICATIONS ACT AND COMMISSION RULES AND POLICIES

A. Licensing Qualifications

18. *Background.* As a threshold matter, we must determine whether the Applicants meet the requisite qualifications under the Act and our rules.⁵⁷ Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite “citizenship, character, financial, technical, and other qualifications.”⁵⁸ No issues have been raised in this case that would require us to re-evaluate the basic qualifications of Hughes, the transferor, and we thus find that Hughes is a qualified transferor. As to the qualifications of the transferee, Section 310(d) requires that the Commission consider the qualifications of the proposed transferee as if the transferee were applying for the license directly under Section 308 of the Act.⁵⁹ Therefore, our review of the transferee, News Corp., includes examination of whether News Corp. has the requisite “citizenship, character, and financial, technical, and other qualifications” that we require of all applicants for a Commission license.⁶⁰

19. *Position of Parties.* EchoStar is the only party that challenges News Corp.’s qualifications to be a Commission licensee on the basis of character. EchoStar’s assertions relate to a pending criminal investigation, as well as pending civil litigation cases, filed against NDS Group, plc. (“NDS”), a company that is 79% owned by News Corp.⁶¹ EchoStar asserts that NDS is reportedly the subject of a criminal investigation by the U.S. Attorney General’s office for, among other things, the willful violation of criminal statutes outlawing the circumvention of disabling of encryption technology (*i.e.*, hacking).⁶² This investigation, according to EchoStar, may possibly lead to criminal indictments resulting in a felony conviction that could implicate the Commission’s character policy as to News Corp.’s qualifications.⁶³

20. EchoStar also claims that NDS is the defendant in civil law suits brought by EchoStar, Canal+ (Vivendi Universal), DirecTV, and EchoStar and NagraStar L.L.C. (“NagraStar”).⁶⁴ According to EchoStar, these lawsuits involve allegations of, *inter alia*, willful hacking of the security functions of a

⁵⁷ 47 U.S.C. § 310(d).

⁵⁸ See 47 U.S.C. §§ 310(d) and 308.

⁵⁹ See 47 U.S.C. § 308.

⁶⁰ News Corp., through its subsidiaries, already holds Commission licenses under Title III. See, e.g., *Applications of UTV of San Francisco, Inc., et al., (Assignors) and Fox Television Stations, Inc. (Assignee) For Consent to the Assignment of Licenses for Stations KBHK-TV, San Francisco, CA, et al.*, 16 FCC Rcd 14975 (2001) (“*UTV of San Francisco Order*”).

⁶¹ EchoStar Petition at 50-57. See also ¶ 7, *supra*.

⁶² EchoStar Petition at 50-52. EchoStar asserts that the Attorney General’s investigation involves criminal and civil liability under the Digital Millennium Copyright Act and related statutes.

⁶³ *Id.*

⁶⁴ EchoStar Petition at 50, 51, 54. EchoStar notes that Canal + (Vivendi Universal) recently settled its lawsuit against NDS for willful hacking of its encryption software, unfair competition, and violations of the Communications Act of 1934. *Id.* at 55.

number of MVPD platforms; unfair competition in the provision of mass media-related services; corporate sabotage and satellite signal piracy; violations of the California unfair competition statute, the Digital Millennium Copyright Act (“DMCA”), and the Communications Act of 1934; breach of contract, fraud, breach of warranty and misappropriation of trade secrets.⁶⁵

21. EchoStar argues that the pending federal criminal investigation and civil litigation cases involve matters that should be of paramount concern to the Commission.⁶⁶ In addition, EchoStar maintains that a possible finding that NDS has engaged in such alleged activities would be highly relevant to the application of the Commission’s character policy to News Corp.’s qualifications.⁶⁷ Thus, EchoStar submits that the Commission should put the current proceeding on hold while it undertakes its own investigation of these factual allegations⁶⁸ or at least await the outcome of the criminal investigation.⁶⁹ EchoStar surmises that, in the alternative, should the U.S. Attorney General’s investigation result in a felony conviction, the Commission would be faced with an extremely burdensome license revocation proceeding.⁷⁰ Finally, EchoStar asserts that News Corp. failed to report the criminal investigation of NDS’s activities on its FCC Form 312 Application in this proceeding even though these facts are directly relevant to the Commission’s analysis of its qualifications.⁷¹

22. In response, the Applicants point out that EchoStar took the opposite position on the relevance of pending such proceedings just last year when its own qualifications were challenged in connection with its plan to merge with Hughes, based on its alleged failure to engage in collective bargaining and other labor law concerns.⁷² The Applicants point out that in that case, the Commission held that any “unadjudicated non-FCC violations” as to EchoStar “should be resolved by the governmental agency with proper jurisdiction.”⁷³

23. *Discussion.* The Commission has long held that character qualifications of an applicant or licensee are relevant to the Commission’s public interest analysis and that an applicant’s or licensee’s willingness to violate other laws, and in particular to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies. To this end, the Commission has determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to

⁶⁵ *Id.*

⁶⁶ EchoStar Petition at 51.

⁶⁷ *Id.* at 52.

⁶⁸ *Id.* at 56-57.

⁶⁹ EchoStar contends that the Commission has repeatedly stayed its hand to await the result of proceedings that implicate issues key to the assessment of an applicant’s character. *Id.*

⁷⁰ *Id.* at 56.

⁷¹ *Id.* at 57 (citing FCC Form 312, Questions 39, 37).

⁷² Applicants’ Reply at 77.

⁷³ *Id.* (citing *EchoStar-DirectTV HDO*, 17 FCC Red at 20579).

governmental units; and (3) violations of antitrust or other laws protecting competition.⁷⁴ The Commission has also stated that it will consider non-FCC related misconduct of the licensee's or applicant's parent or related subsidiary where there is a sufficient nexus between the licensee or applicant and the parent corporation or a related subsidiary.⁷⁵ Further, the Commission has used its character policy in the broadcast area as guidance in resolving similar questions in transfer of common carrier authorizations and other license transfer proceedings.⁷⁶

24. We do not agree with EchoStar that the alleged pending federal criminal investigation and civil cases against NDS warrant disqualification of News Corp. on the basis of character. Unadjudicated non-FCC violations should be resolved by a court with proper jurisdiction and should not be pre-judged by our processes.⁷⁷ Because the investigation and civil cases cited by EchoStar are pending matters, they are irrelevant to News Corp's character qualifications under the Commission's long-held position that there "must be an ultimate adjudication before an appropriate trier of fact, either by a government agency or court, before we will consider the activity in our character determinations."⁷⁸

25. We also do not agree with EchoStar that we should hold this proceeding in abeyance in order to undertake a separate investigation into the matters alleged, or await the outcome of the criminal investigation by the Attorney General's Office.⁷⁹ The cases cited by EchoStar do not persuade us otherwise.⁸⁰ Both of the cases cited by EchoStar involve previous findings by an appropriate trier of fact of misconduct on behalf of the applicant's or licensee's parent.⁸¹ In those cases, the Commission was justified in its decision to delay resolution of the related license applications to allow consideration of the adjudicated misconduct in its license review process. The instant case involves allegations concerning a

⁷⁴ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1209-10 (1986) ("Character Policy Statement 1986"), modified, 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991), modified in part, 7 FCC Rcd 6564 (1992) (collectively "Broadcast Licensing Character Qualifications").

⁷⁵ See, e.g., *Broadcast Licensing Character Qualifications*, 7 FCC Rcd at 6567, ¶ 16. As a general matter, non-FCC misconduct by parent or related subsidiary is reportable if (a) there is a close ongoing relationship between the parent (or related subsidiary) and the licensee; (b) the two have common principals; and (c) the common principals are actively involved in the operations of the licensee. *Id.* Misconduct directly involving common principals is reportable where the common principal of the licensee or applicant was in control of the other entity or was adjudicated to be directly involved in the other entity's misconduct. *Id.* n.51.

⁷⁶ See *Broadcast Licensing Character Qualifications*, 7 FCC Rcd at 6567; see also *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n.14 (1988).

⁷⁷ See *Character Policy Statement 1986*, 102 F.C.C.2d at 1205.

⁷⁸ *Id.*

⁷⁹ See EchoStar Petition at 56-57.

⁸⁰ See EchoStar Petition at 51, 56-57 (citing *Continental Satellite Corporation*, 4 FCC Rcd 6292, 6299 (1989) ("Continental Order"); *RKO General, Inc.*, 3 FCC Rcd 5057, 5058 (1988) ("RKO Order"), appeal dismissed sub nom. *Los Angeles Television v. FCC*, No. 88-1693 (D.C. Cir. Aug. 4, 1989)).

⁸¹ See *Continental Order*, 4 FCC Rcd at 6298 (citing *Central Telecommunications, Inc. v TCI Cablevision*, 610 F. Supp. 891 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert. denied* 480 U.S. 910 (1987); and *RKO Order*, 3 FCC Rcd 5057, 5058).

pending criminal investigation and various pending civil lawsuits, none of which have been finally adjudicated. As we do not typically give consideration to pending matters not involving FCC-related misconduct in reaching character determinations, it would be inappropriate to rely on these pending matters as a basis for delaying resolution of the instant Application.⁸² Indeed, holding this proceeding in abeyance on the grounds advocated by EchoStar would only create uncertainty, delay, and expense that would disserve the public interest.

26. Finally, EchoStar's assertion that News Corp. failed to report the criminal investigation of NDS's activities on FCC Form 312 lacks merit. The Commission's rules do not impose upon applicants a requirement to report *pending* criminal investigations,⁸³ nor does the application filed in this proceeding, FCC Form 312, require specific disclosure of *pending* criminal matters *prior* to conviction.⁸⁴ The pending matters referred to in question 39 of FCC Form 312 relate to cases where there has been a conviction (as may be listed in response to question 37) or adjudication of guilt (as may be listed in response to question 38) of the party to the application or of a party directly or indirectly controlling the applicant.⁸⁵

B. Foreign Ownership

27. *Background.* Generally, foreign ownership interests in Title III licensees are governed by Section 310(a) and (b) of the Act.⁸⁶ The policies and rules implementing these foreign ownership provisions with respect to satellite services are largely articulated in the *DISCO II Order*, and support the Commission's policy objectives of promoting competition in the U.S. market and achieving a more competitive global satellite market.⁸⁷ The *DISCO II Order* and a companion decision, the *Foreign Participation Order*,⁸⁸ are the initial Commission decisions implementing market opening commitments made by the United States in the World Trade Organization ("WTO") Agreement on Basic

⁸² See *Character Policy Statement 1986*, 102 F.C.C.2d 1205.

⁸³ See 47 C.F.R. § 1.65.

⁸⁴ See *Lockheed Martin Corp., et al.*, 17 FCC Rcd 13160, 13166 ¶ 16 (2002). See also Application for Space and Earth Station Authorizations For Transfer of Control or Assignment, FCC 312 Main Form ("FCC Form 312"), which requires that an applicant or any party directly or indirectly controlling the applicant inform the Commission of a conviction of a felony in any state or federal court (question 37) or a court's final adjudication of unlawful monopolization or unfair methods of competition (question 38). See FCC Form 312, Questions 37, 38.

⁸⁵ See *Lockheed Martin Corp., et al.*, 17 FCC Rcd 13160, 13166 ¶ 16 (2002). Question 39 of FCC Form 312 asks whether the applicant, or any person directly or indirectly controlling the applicant, is currently a party in any pending matter referred to in the preceding two items (*i.e.*, questions 37 and 38). See FCC Form 312, Question 39.

⁸⁶ 47 U.S.C. § 310(a) and (b).

⁸⁷ See *DISCO II Order*, 12 FCC Rcd at 24097.

⁸⁸ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891, 23894 (1997) (*Foreign Participation Order*); *Order on Reconsideration*, 15 FCC Rcd 18158 (2000).

Telecommunications Services (“WTO Basic Telecom Agreement”),⁸⁹ and remain central to the Commission’s overall foreign ownership policy today.

28. In the *DISCO II Order*, the Commission implemented a number of measures to foster competition among multiple satellite service providers, including adoption of a rebuttable presumption that entry by WTO Member satellite systems will promote competition in the United States.⁹⁰ The Commission, however, explicitly did not apply this open entry presumption to satellites providing DBS, Direct-to-Home (“DTH”), and Digital Audio Radio Services (“DARS”), as these services were not covered by commitments made as part of the WTO Basic Telecom Agreement (*i.e.*, “non-WTO covered services”).⁹¹ The Commission determined that for all requests to provide non-WTO covered services to the United States using non-U.S. licensed satellites, an evaluation was required to determine whether effective competitive opportunities (“ECO”) for U.S. satellite systems were available in the country in which the foreign satellite was licensed (“ECO-Sat test”).⁹²

29. *Position of Parties.* EchoStar contends that the Commission should determine if Australia provides effective competitive opportunities to U.S. companies to provide the same service News Corp. would be authorized to provide in the United States.⁹³ EchoStar maintains that the underlying rationale for applying the *DISCO II* ECO-Sat test to the provision of non-WTO covered services, *i.e.*, “to encourage open markets for these services and to avoid anti-competitive conduct in the U.S. market,” holds whether the foreign company is attempting to gain entry to the U.S. market through a foreign licensed satellite or through acquisition.⁹⁴ Accordingly, EchoStar argues the Commission should apply the ECO-Sat test in this case.⁹⁵

30. The Applicants respond that the ECO-Sat test is wholly irrelevant to this proceeding. They assert that the ECO-Sat test applies only to parties “requesting authority to operate with a non-U.S.

⁸⁹ This agreement, which became effective on January 1, 1998, is centered on the principles of open markets, private investment, and competition. See *DISCO II Order*, 12 FCC Rcd at 24096.

⁹⁰ See *DISCO II Order*, 12 FCC Rcd at 24098. Opposing parties have the burden to rebut the presumption by showing that granting the application would cause competitive harm in the U.S. satellite market. *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See EchoStar Petition at 46-50. EchoStar submits Australia is one of News Corp.’s home markets because it is incorporated in Australia and is a 25% owner of FOXTEL, Australia’s leading subscription television provider. *Id.* at 47.

⁹⁴ *Id.* at 47, quoting *DISCO II Order*, 12 FCC Rcd at 24137, ¶ 98.

⁹⁵ *Id.* EchoStar argues that News Corp. would fail both the *de jure* and *de facto* components of the ECO-Sat test with respect to Australia. EchoStar claims *de jure* barriers exist due to statutory limits on U.S. investments for subscription television broadcasting licenses and programming expenditure requirements. EchoStar claims *de facto* barriers exist due to a content-sharing agreement between an Australian News Corp. affiliate and a major Australian subscription television company. *Id.* at 47-50.

licensed space station to serve the United States.”⁹⁶ Thus, by its terms, Applicants claim the ECO-Sat test does not apply to foreign investments in U.S. licensed DBS providers. They submit that this position is confirmed in the recent *SES-DTH Order*.⁹⁷ Further, the Applicants contend that application of the ECO-Sat test to U.S. licensed systems would not make any sense as a matter of policy, especially in view of the Commission’s 2002 *DBS Report and Order*,⁹⁸ which found that there was “no public policy justification for imposing foreign ownership restrictions on DBS providers,” in part because such restrictions would prevent DBS from achieving a “more equal regulatory basis with cable,” which is not subject to any foreign ownership restrictions.⁹⁹ Alternatively, the Applicants argue that even if the ECO-Sat test did apply, the Commission should find that there is no foreign ownership issue in this proceeding because News Corp.’s “home market” is the United States.¹⁰⁰

31. *Discussion.* Because of the foreign ownership interests presented in this case,¹⁰¹ we first consider the applicability of Section 310(a) and (b) of the Act.¹⁰² We find that neither provision applies to the proposed transaction. No foreign government or its representative would hold any of the subject licenses. Thus, our review does not fall under Section 310(a) of the Act, which prohibits “any foreign government or the representative thereof” from holding a license.¹⁰³ Further, the Application before us involves the transfer of control of earth station licenses, space station licenses for provision of FSS and DBS service, and wireless licenses, all of which are held, and are to be transferred, on a non-common carrier basis.¹⁰⁴ Thus, we find that the proposed transaction does not involve a “broadcast or common

⁹⁶ Applicants’ Reply at 68 (citing 47 C.F.R. § 25.137(a); and *DISCO II*, 12 FCC Rcd at 24136). See also Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (Sept. 5, 2003) (“Applicants’ Sept. 5, 2003 Ex Parte”) at 1-2.

⁹⁷ See *SES AMERICOM, Inc. Applications for Modification of Fixed-Satellite Service Space Station Licenses and Columbia Communications Corp.*, 18 FCC Rcd 18598 (IB 2003) (“*SES-DTH Order*”); see also Applicants’ Sept. 5, 2003 Ex Parte at 1-2.

⁹⁸ See *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11311, 11348 (2002) (“*2002 DBS Report and Order*”).

⁹⁹ Applicants’ Reply at 68, citing *2002 DBS Report and Order*, 17 FCC Rcd at 11348.

¹⁰⁰ See Applicants’ Sept. 5, 2003 Ex Parte at 2-4.

¹⁰¹ News Corp. is incorporated under the laws of South Australia with securities that are publicly traded on both the New York Stock Exchange and the Australian Stock Exchange. See Application at 7.

¹⁰² See 47 U.S.C. § 310(a) and (b).

¹⁰³ See 47 U.S.C. § 310(a).

¹⁰⁴ See Application at 5 n.7 & 16 n.30. Subscription DBS service is a “non-broadcast” service and where subscription DBS service is provided on a non-common carrier basis Section 310(b) of the Act does not apply. See *Subscription Video Order*, 2 F.C.C.2d 1001, 1007 (1987), *aff’d.*, *National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988); *Subscription Video Order Services*, 4 FCC Rcd 4948 (1989); *MCI Telecommunications Corp.*, 11 FCC Rcd 16275 (IB 1996); *Application of MCI Telecommunications Corp., et. al.*, 14 FCC Rcd 11077 (IB 1999).

carrier or aeronautical en route or aeronautical fixed radio station license,” and the statutory provisions of Section 310(b) of the Act do not apply.¹⁰⁵

32. However, in the *2002 DBS Report and Order*, the Commission stated that although it would not impose additional foreign ownership rules on providers of DBS subscription services beyond those already required by Section 310(a) and (b) of the Act,¹⁰⁶ in deciding questions of access to the U.S. market for provision of DBS service through use of non-U.S. licensed satellites, the Commission concluded that it would apply the requirements set forth in the *DISCO II Order*.¹⁰⁷ As stated earlier, the *DISCO II Order* requires that the Commission apply the ECO-Sat test to all requests to access the U.S. market for the provision of non-WTO covered services (*i.e.*, DTH, DBS and DARS) using non-U.S. licensed satellites.¹⁰⁸ Thus, we note that if News Corp. were seeking to operate a foreign-licensed satellite to provide DBS service in the United States, we would not permit it to do so until we conducted an ECO-Sat analysis.¹⁰⁹ The proposed transaction, however, does not involve a request to use non-U.S. licensed satellites but rather a request to acquire U.S. licensed satellites to deliver DBS service to the U.S. market. As such, the instant transaction does not fall within the analytic framework adopted by the Commission in the *DISCO II Order* and, thus, application of the ECO-Sat test is not required in this case.¹¹⁰

33. Regardless of the applicability of Section 310(a) and (b) of the Act or the ECO-Sat test, the Commission maintains a responsibility pursuant to Section 310(d) to examine and make a finding as to whether a specific transfer or assignment involving Title III licenses will serve the public interest, convenience, and necessity.¹¹¹ Thus, consistent with our responsibilities under Section 310(d), where

¹⁰⁵ Because section 310(b) does not apply to the proposed transaction, we need not consider whether News Corp.’s acquisition of a controlling interest in the subject licenses is consistent with the Commission’s decision in *Fox Television Stations* or is otherwise consistent with the public interest under section 301(b)(4) of the Act. *See Fox Television Stations, Inc.*, Second Memorandum Opinion and Order, 11 FCC Rcd 5714 (1995) (*Fox II*) (subject to certain limitations, allowing FTS, as presently structured, to make future indirect investments in broadcast licensees notwithstanding News Corp.’s ownership of FTS in excess of the 25 percent benchmark for indirect foreign ownership set by section 310(b)(4)). *See also UTV of San Francisco Order*, 16 FCC Rcd at 14977-80.

¹⁰⁶ *2002 DBS Report and Order*, 17 FCC Rcd at 11346-48.

¹⁰⁷ *See 2002 DBS Report and Order*, 17 FCC Rcd at 11349.

¹⁰⁸ *See DISCO II Order*, 12 FCC Rcd at 24135.

¹⁰⁹ *See DISCO II Order*, 12 FCC Rcd at 24136. *See also Digital Broadband Applications Corp., Consolidated Application for Authority to Operate U.S. Earth Stations with a U.S.- Licensed Ku-Band FSS Satellite and Canadian-Licensed Nimiq and Nimiq 2 Satellites to Offer Integrated Two-Way Broadband Video and Data Service Throughout the United States*, 18 FCC Rcd 9455 (2003) (“*DBAC Order*”).

¹¹⁰ In addition, we note that the Commission has concluded that there is no public policy justification for imposing foreign ownership restrictions on DBS providers that are not subject to such restrictions under Section 310(b) of the Act. *See 2002 DBS Report and Order*, 17 FCC Rcd at 11348. Licensees using FSS satellites to provide subscription DTH service, an almost identical service to DBS, are not subject to foreign ownership restrictions. In addition, because cable operators also are not subject to foreign ownership restrictions, eliminating additional foreign ownership-licensing restrictions not otherwise required under the Act, allows DBS to compete on a more equal regulatory basis with cable operators. *Id.*

¹¹¹ 47 U.S.C. § 310(d).

*appropriate, our review considers whether public interest harms are likely to result from foreign investment in Title III licensees.*¹¹² Therefore, in this case, we consider whether foreign investment in a U.S. licensee is likely to distort competition in any relevant U.S. market. We also consider whether such foreign investment will further competition in the U.S. market and whether efficiencies and other public interest benefits are likely to result. If we find any harms resulting from foreign investment, these harms will be taken into consideration in the overall balancing of the potential public interest harms and benefits of the proposed transaction.¹¹³

34. EchoStar argues that before granting the instant Application, the Commission should be satisfied that Australia provides effective competitive opportunities to U.S. companies to provide the same services News Corp. would be authorized to provide in the United States.¹¹⁴ We are not persuaded by EchoStar's arguments that there is a need in this case for the Commission to take steps to ensure that U.S. companies can compete effectively in Australia.¹¹⁵ The nature of our inquiry here focuses on whether the provision of Title III services by a U.S. licensee (with a controlling interest held by a foreign incorporated entity) would harm competition in the U.S. market. EchoStar's argument, at best, advances the position that U.S. licensees could be at a competitive disadvantage in the Australian market due to Australia's statutory and regulatory foreign ownership limitations on subscription television.¹¹⁶ EchoStar does not provide any evidence or arguments to show how Australia's requirements could cause competitive distortions or competitive harm in the U.S. market. For example, EchoStar does not argue or show how News Corp.'s investment could limit competitive choices for U.S. consumers; nor does EchoStar argue or show how the acquisition of a controlling interest in a U.S. licensee by News Corp. could result in increased concentration in the global market, and thereby cause competitive harm in the U.S. market. No evidence was provided, for example, that DirecTV, because of its relationship with News Corp., could provide DBS services to the U.S. market that a U.S.-owned operator could not provide. Based on our review of the record, we find that the proposed acquisition of Hughes by News Corp. is not likely to create competitive distortions in the U.S. market based upon News Corp.'s incorporation or activities in Australia.¹¹⁷

¹¹² See, e.g., *Orbcomm Order*, 17 FCC Rcd 4507 ¶ 18; *SES-DTH Order*, ¶ 10.

¹¹³ See Section IX, *infra*.

¹¹⁴ EchoStar Petition at 47.

¹¹⁵ *Id.* at 46-50.

¹¹⁶ *Id.* at 48-50. In response to EchoStar's arguments, the Applicants submit that the Australian foreign ownership provisions are similar to the U.S. limitations imposed on direct foreign investment in U.S.-licensed broadcast and common carrier licensees under Section 310(b)(3) of the Act, and that under Australian law, there is no limit on or prohibition against foreign control of a subscription DTH licensee company. By contrast, the Applicants contend that under U.S. law, even indirect ownership in a broadcast or common carrier licensee is presumptively limited to no more than a non-controlling 25% interest absent authorization from the Commission to exceed that benchmark. Thus, Applicants state, that taken as a whole, the Australian subscription DTH market is at least as open to foreign investors as is the U.S. market. See Applicants' Sept. 5 Ex Parte at 5, 6.

¹¹⁷ According to the Applicants, News Corp. conducts its business activities principally in the United States, Continental Europe, the United Kingdom, Australia, Asia and the Pacific Basin. In addition, News Corp. states that it derives 7% of its operating income and 8% of its revenues from a combined Australian/Asian market, and has three members on its Board of Directors who are citizens of Australia and one member on the Executive (continued....)

C. National Security, Law Enforcement, Foreign Policy and Trade Policy Concerns

35. As part of our public interest analysis, our review takes into consideration concerns relating to national security, law enforcement, foreign policy and trade policy that may present public interest harm, including any such issues raised by the Executive Branch.¹¹⁸ If the Executive Branch raises national security, law enforcement, foreign policy or trade policy concerns, we accord deference to its expertise on such matters.¹¹⁹ On November 25, 2003, the DOJ, and the Federal Bureau of Investigation (“FBI”), with the concurrence of the Department of Homeland Security (“DHS”) (collectively referred to as the “Executive Agencies”), filed a “Petition to Adopt Conditions to Authorizations and Licenses” (“Petition to Adopt Conditions”),¹²⁰ along with attachments in this proceeding.¹²¹

36. Specifically, in the Petition to Adopt Conditions, the Executive Agencies state that their ability to satisfy their obligations to protect the national security, to enforce the laws, and to preserve the safety of the public could be significantly impaired by transactions in which foreign entities will own or operate a part of the U.S. communications system, or in which foreign-located facilities will be used to provide domestic communications services to U.S. customers.¹²² The Executive Agencies note, that News Corp., the foreign entity acquiring control of Hughes (through its controlling interest in FEG), is organized under the laws of Australia.¹²³

37. According to the Executive Agencies, after discussions with the Applicants, the Executive Agencies concluded that the commitments set forth in the Hughes By-law Amendment, the Proposed Resolutions, and the Letter Agreement were adequate to ensure that the Executive Agencies and other entities with responsibility for enforcing the law, protecting the national security and preserving public

(Continued from previous page)

Management Committee who is a citizen of Australia. See Applicants’ Sept. 5 Ex Parte at 2-4; see also Application, Attachment C.

¹¹⁸ See *DISCO II Order*, 12 FCC Rcd at 24170-72. See also, e.g., *Lockheed Martin Global Telecommunications, Inc., et al.*, 16 FCC Rcd 20502, 20508-20510 ¶¶ 12, 16 (2001); *Orion*, 5 FCC Rcd at 4939 ¶ 20; *Application of General Electric Capital Corporation and SES Global S.A. for Consent to Transfer Control of Licenses and Authorizations Pursuant to Section 214(a) and 310(d) of the Communications Act*, 16 FCC Rcd 17575, n.78 (2001); *TMI Communications and Company, L.P. and SatCom Systems Inc., File No. 647-DSE-P/L-98 et al.*, 14 FCC Rcd 20798 at 20824 ¶ 57 (1999).

¹¹⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23918-21.

¹²⁰ See Petition to Adopt Conditions to Authorizations and Licenses, MB Docket No. 03-124 (filed Nov. 25, 2003).

¹²¹ The attachments include Exhibit 1, Hughes Electronics Corporation, Amended and Restated By-laws (“Hughes By-law Amendment”); Exhibit 2, Proposed Resolution of the Board of Directors of The News Corporation Limited (“Proposed Resolutions”); and Exhibit 3, Letter Agreement, dated November 3, 2003, reached between Hughes and the Executive Agencies (“Letter Agreement”). See Petition to Adopt Conditions at 2. These exhibits are set forth in Appendix E of this Order and Authorization.

¹²² See Petition to Adopt Conditions at 4.

¹²³ The Executive Agencies also note that K. Rupert Murdoch, a United States citizen, directly and indirectly controls approximately a 16% equity/30% voting interest in News Corp. and that apart from Liberty Media Corporation, a Delaware corporation which according to the Applicants holds a purely passive interest in News Corp., there is no other shareholder with a greater than 10% interest in News Corp. *Id.* at 4-5.

safety can proceed in a legal, secure and confidential manner to satisfy these responsibilities.¹²⁴ Accordingly, DOJ and FBI, with the concurrence of DHS, advised the Commission that they have no objections to the grant of the Applicants' transfer of control applications, provided that the Commission condition the grant of the transfer of control applications on (i) GM causing Hughes to adopt, and Hughes adopting, prior to the closing of the subject transaction, the Hughes By-law Amendment; (ii) the adoption by the Board of Directors of News Corp. of the Proposed Resolutions; and (iii) compliance by Hughes and News Corp., respectively, with the commitments set forth in the Hughes By-laws Amendment, the Proposed Resolutions, and the Letter Agreement.¹²⁵

38. In assessing the public interest, we consider the record and accord the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.¹²⁶ As the Commission stated in the *Foreign Participation Order*, foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch.¹²⁷ In the context of this particular proceeding, we consider these concerns independent of our own separate analysis. Therefore, in accordance with the request of the Executive Agencies, in the absence of any objection from the Applicants, and given the discussion above, we condition our grant of the Applications on compliance with the following conditions: (i) GM causing Hughes to adopt, and Hughes adopting, prior to the closing of the subject transaction, the Hughes By-law Amendment; (ii) the adoption by the Board of Directors of News Corp. of the Proposed Resolutions; and (iii) compliance by Hughes and News Corp., respectively, with the commitments set forth in the Hughes By-laws Amendment, the Proposed Resolutions, and the Letter Agreement.¹²⁸

V. INTRODUCTION TO THE VIDEO PROGRAMMING AND MVPD MARKETS

A. Background

39. The proposed transaction involves the acquisition by News Corp., a major owner of both broadcast and cable video programming content and programming-related technologies, of a 34% interest in Hughes Electronics, owner of DirecTV, a DBS provider that is the second largest MVPD in the United States and the largest MVPD that has a national service footprint. News Corp. presently has no MVPD assets in the United States; its' primary domestic business is the provision of video programming to MVPDs in every area of the country. Similarly, Hughes currently does not participate in the video programming market as a programming supplier;¹²⁹ rather, its DirecTV subsidiary functions purchaser

¹²⁴ Appendix E to this Order and Authorization attaches the three exhibits as Exhibit 1(Hughes By-laws Amendment); Exhibit 2 (Proposed Resolutions); and Exhibit 3 (Letter Agreement).

¹²⁵ See Petition to Adopt Conditions at 5-6. See also Appendix E.

¹²⁶ See *Foreign Participation Order*, 12 FCC Rcd at 23919-21 ¶¶ 61-66.

¹²⁷ See *Foreign Participation Order*, 12 FCC Rcd at 23919 ¶ 62.

¹²⁸ See Appendix E. A complete list of all the conditions imposed on the Applicants is contained in Appendix F.

¹²⁹ Although Hughes does not supply programming content, it is involved in the provision of fixed satellite services ("FSS") through PanAmSat. Most distribution of video programming to MVPD service providers (and to over-the-air television broadcasters) is carried over FSS. PanAmSat is a significant provider of FSS services and is 81% owned by Hughes. The impact of the transaction on FSS is discussed at Section VI.C.4.e below.

and distributor of multichannel video programming to subscribing customers.¹³⁰ By acquiring DirecTV, News Corp. immediately transforms itself from a supplier of video programming MVPDs to a vertically integrated MVPD competitor. News Corp. thus becomes a vertically integrated supplier of broadcast and cable video programming to all of its' MVPD competitors in every region of the country.

40. Applicants have alleged that a combination of economic forces, existing regulatory constraints and their own program access and program carriage commitments will suffice to protect competition and consumers against potential competitive harms arising from the transaction.¹³¹ Commenters and opponents argue, among other things, that News Corp.'s acquisition of a controlling interest in the second largest MVPD will increase the incentive and ability of News Corp. to seek and obtain supra-competitive prices for its video programming services through retransmission consent negotiations for its local broadcast television station signals and in affiliate agreement negotiations for its regional sports cable networks. This, they contend, will increase rival MVPD costs, who will in turn seek to recover these increased costs through end-user rate increases, a result not foreclosed by either the program access or retransmission consent rules, or the Applicants' offered additional commitments.¹³² Before assessing these claims, we first provide some background on relevant Commission rules concerning the distribution of video programming, including our program access rules, program carriage rules, and the must-carry/retransmission consent requirements, and on economic theory concerning horizontal and vertical transactions. We then define the relevant upstream and downstream markets and consider whether the transaction is likely to have adverse competitive effects in those markets.

B. Applicable Regulatory Framework

1. Program Access Requirements

41. The program access provisions, contained in Section 628 of the Communications Act, were adopted as part of the Cable Television Consumer Protection and Competition Act of 1992.¹³³ At the time, Congress was concerned that most cable operators enjoyed a monopoly in program distribution at the local level.¹³⁴ Congress found that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.¹³⁵ Section 628 is intended to foster the development of competition to traditional cable systems by governing the access of competing MVPDs to cable programming services. DBS was among the technologies that Congress intended to foster through the program access

¹³⁰ Hughes' only programming interest is a 5% passive equity interest in the Hallmark Channel. *See* Application at 46.

¹³¹ Application at 47-48; Applicants' Reply at iii-iv.

¹³² *See, e.g.,* ACA Comments at 7-23; Cablevision Comments at 8-30; CDD Comments; CFA Reply Comments at 3-12; Consumers Union Sept. 23, 2003 Ex Parte; EchoStar Petition at 11-39, 58-67; JCC Comments at 13-65; NAB Comments at 5-9, 15-26; NRTC Petition at 7-15; RCN Comments at 4-11; Pegasus Comments.

¹³³ Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

¹³⁴ H.R. Conf. Rep. No. 102-862, at 93 (1992).

¹³⁵ 1992 Cable Act § 2(a)(5).

provisions.¹³⁶ As a general matter, the program access rules prohibit a cable operator, a satellite cable programming vendor¹³⁷ in which a cable operator has an attributable interest, or a satellite broadcast programming vendor from engaging in “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming or satellite broadcast programming to subscribers of consumers.”¹³⁸ Thus, Congress in 1992 acknowledged that access to satellite cable programming was critical to ensure competition and diversity in the satellite programming and MVPD markets by prohibiting permanent foreclosure of satellite cable programming and requiring non-discrimination in its provision by vertically integrated cable operators and satellite cable programming vendors. As required in the statute, the Commission, in 2002, examined the developments and changes in the MVPD marketplace in the ten years since the enactment of the program access statute.¹³⁹ The Commission concluded that the competitive landscape had changed for the better since 1992, but that vertically integrated programmers continued to have the incentive and ability to favor affiliated cable operators over other MVPDs.¹⁴⁰

42. The program access rules specifically prohibit cable operators, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite cable programming vendor from:

- Engaging in unfair acts or practices which hinder significantly or prohibit an MVPD from providing satellite cable programming to subscribers or consumers.¹⁴¹
- Discriminating in the prices, terms and conditions of sale or delivery of satellite cable programming.¹⁴²
- Entering into exclusive contracts with cable operators unless the Commission finds the exclusivity to be in the public interest.¹⁴³

¹³⁶ H.R. Rep. No. 102-628, at 165-66 (1992) (additional views of Messrs. Tauzin, Harris, Cooper, Synar, Eckart, Bruce, Slattery, Boucher, Hall, Holloway, Upton and Hastert).

¹³⁷ “Satellite cable programming” is video programming which is transmitted via satellite to cable operators for retransmission to cable subscribers. 47 C.F.R. § 76.1000(h). A “satellite cable programming vendor” is an entity engaged in the production, creation or wholesale distribution for sale of satellite cable programming. 47 C.F.R. § 76.1000(i).

¹³⁸ Communications Act § 628(b); 47 U.S.C. § 548(b).

¹³⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12123 (2002) (“*Program Access Order*”).

¹⁴⁰ *Program Access Order*, 17 FCC Rcd at 12153.

¹⁴¹ 47 C.F.R. § 76.1001.

¹⁴² 47 C.F.R. § 76.1002(b).

¹⁴³ 47 C.F.R. § 1002(b)(4). The exclusivity prohibition sunsets on October 5, 2007, unless extended by the Commission. 47 C.F.R. § 1002(c)(6).